TABLE OF CONTENTS

Excerpt from Appellees' Brief, Texas Court of Appeals for the 11th District (June 2, 2004)..... 1a

Excerpt from Appellees' Brief, Texas Court of Appeals for the 11th District (June 2, 2004)

No. 11-03-00300-CV

In the Eleventh Court of Appeals

TRANSIT MIX CONCRETE & MATERIALS COMPANY AND TRINITY MATERIALS, INC., AND TRANSIT MIX AND MATERIALS COMPANY,
Appellants,

v.

DARLETA ROCHELLE JOHNSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BRAD F. JOHNSON, SR., DECEASED, AND AS NEXT FRIEND OF BRAD JOHNSON, JR., JERELLE JOHNSON AND AMETHYST JOHNSON, MINORS,
Appellees.

ON APPEAL FROM THE 158th DISTRICT COURT
OF JEFFERSON COUNTY, TEXAS
CAUSE No. A-164,606

APPELLEES' BRIEF

HOLMAN KEELING & YORK, P.C.
David W. Holman
State Bar No. 09902500
Diana M. Sangalli
State Bar No. 24033926
440 Louisiana, Suite 2220
Houston, Texas 77702
Telephone (713) 223-2220
Facsimile (713) 223-2224
Lead Counsel on Appeal

MULLIN HOARD & BROWN, L.L.P.
Donald M. Hunt
State Bar No. 10284000
P.O. Box 2585
Lubbock, Texas 79408-2585
Telephone (806) 765-7491
Facsimile (806) 765-0553

LAW OFFICES OF FRANK HERRERA
Frank Herrera, Jr.
State Bar No. 09531000
Jose Luis Garriga
State Bar No. 07703450
Riverview Towers
111 Soledad, Suite 1900
San Antonio, Texas 78205
Telephone (210) 224-1054
Facsimile (210) 228-0887

LAW OFFICES OF GILBERT T. ADAMS, P.C.
Gilbert T. Adams
State Bar No. 00893000
Cheryl A. Schultz
State Bar No. 17836900
1855 Calder Avenue @ Third Street

Post Office Drawer 3688
Beaumont, Texas 77704-3688
Telephone (409)835-3000
Facsimile (409)832-6162

Counsel for Appellees

* * *

[p. 21]

1. Trinity's Duty To Implement MSHA's Directives

Trinity has a duty to implement corrective actions as directed by MSHA (2 RR 166-68; 3 RR 25; 4 RR 13-14). Andrews, Trinity's mine safety manager, adopted that duty in a memorandum entitled "Implementing Appropriate Corrective Action As Described By MSHA Mailers." (PX 5). At trial, Andrews acknowledged that if MSHA sends out a warning about a hazard associated with tires and rims, and the company is working around tires and rims on a regular basis, then the company should respond to that warning (2 RR 167-68).

Andrews testified that if a mine operator learns about a hazard, it should give the information to people working around that hazard (2 RR 164). Andrews admitted that MSHA had given Trinity at least four or five warnings prior to the accident about tire and rim safety (4 RR 102). Those specific warnings included warnings to not use heat to remove a tire and to deflate the tire before attempting removal — warnings that, if heeded, would have prevented the accident (PX 1; PX 2; PX

28; PX 29; 3 RR 14; 4 RR 114-15). Andrews admitted that if Trinity had followed its own safety policies, then it should have let Brad Johnson's employer, RDO, know about the MSHA safety rules, which included tire and rim safety (3 RR 84).

With regard to the accident that killed Brad Johnson, Andrews admitted that information in MSHA bulletins would have applied to the activities on the day of the accident (3 RR 13). Specifically, deflation of the tire, as described in the MSHA bulletin, would have applied and, if implemented, would have avoided the accident (3 RR 14). Andrews admitted that he should have seen the MSHA bulletins about tire and rim safety. Those warnings were available in many different [p. 22] places — MSHA mailers, MSHA fatalgrams, MSHA website, and so forth (4 RR 53-54; 5RR 213-14). Andrews acknowledged that he should have implemented the MSHA directives (4 RR 56).Andrews has no excuse for not doing so (Id.).

Thus, there was evidence that Trinity exercised control over Brad Johnson's work activity, but it exercised such control without reasonable care, since it did not inform Brad or his employer, or implement, the MSHA directives that would have saved Brad's life. This alone was evidence to support the jury's findings to Questions 1 and 2.

2. Trinity's Duty To Ensure Contractors Comply With MSHA

Plaintiff's Exhibit 14 shows MSHA's enforcement policy regarding independent contractors (PX 14; 4 RR 35-36). Trinity's witnesses, like Arturo Munoz, its

safety manager, admitted that MSHA requires production operators, like Trinity, to ensure that independent contractors comply with MSHA regulations (4 RR 36; 5 RR 121-122, 182,247-49,251; PX 14, at 9). Thus, Trinity — not the independent contractor-retained the responsibility and control over the contractor's compliance with MSHA regulations. The failure to exercise such control reasonably triggers liability. See *Lee Lewis Constr., Inc. v. Harrison,* 70 S.W.3d 778,784-85 (Tex. 2001) (holding general contractor liable when it "could have prevented Harrison's death if it had enforced its own safety rules . . .").

So too here, the jury was free to infer from the evidence that if Trinity had enforced its own safety policies and required Brad to comply with MSHA regulations, Brad Johnson's death would have been prevented. Andrews admitted as much. He acknowledged that if he had implemented tire and rim safety rules and done training on it, that would have helped prevent the explosion (4RR 114-15) [p. 23]. Thus, this evidence supports the jury's findings to Questions 1 and 2. The judgment should be affirmed.